

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YSC FASHION CORPORATION	:	DETERMINATION
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1985	:	
through June 27, 1988.	:	

Petitioner, YSC Fashion Corporation, 347 West 36th Street, 8th Floor, New York, New York 10018, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1985 through June 27, 1988 (File No. 807355).

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 18, 1990 at 1:15 P.M., with all briefs to be submitted by November 15, 1990. Petitioner appeared at the hearing by Brian B. Song, C.P.A., and its brief was submitted by Mitchell J. Studley, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

ISSUE

Whether petitioner timely filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

On October 12, 1988, the Division of Taxation issued to YSC Fashion Corporation ("YSC") two notices of determination and demands for payment of sales and use taxes due. One notice of determination assessed tax in the amount of \$2,445.71, plus penalty and interest, for a total amount due of \$3,547.75 for the period September 1, 1985 through June 27, 1988 and contained the following explanation:

"Since you did not submit the information requested on our Notice to the Seller Letter, we are unable to complete our desk audit. Therefore, as a result of a test based on the sellers price of business assets, the following taxes are determined to be due in accordance with Section 1138 of the Sales Tax Law."

The other notice of determination assessed penalty pursuant to Tax Law § 1145 in the amount of \$10,000.00 and contained the following explanation:

"The following penalties are being imposed pursuant to Section 1145 of the Tax Law and are based on the results of an audit of your records. This notice is in addition to Notice S881012704C."

At the hearing, the Division of Taxation produced a certified mail record along with an affidavit of Frances Esposito, a clerk in the clerical unit of the Central Office Audit Bureau, both of which indicate that the notices of determination referred to in Finding of Fact "1", supra, were sent, by certified mail, to YSC at 347 West 36th Street, New York, New York 10018 on October 12, 1988. Ms. Esposito's affidavit states that the Division does not request the U.S. Postal Service to obtain a certified mailing receipt from the recipients of a notice of determination assessing sales tax.

On March 24, 1989, YSC's representative, Brian B. Song, C.P.A., mailed, by certified mail, Form TA-9.1 (Request for Conciliation Conference) which was received by the Bureau of Conciliation and Mediation Services on March 28, 1989. This form indicated that a previous request for a conciliation conference had been filed on or about December 10, 1988 along with a corporate power of attorney form but, due to the fact that no response had been received from the Division relative to the previous request, this form was again being filed. Attached to the form (dated March 16, 1989) was a photocopy of what YSC contends was a previously filed Form TA-9.1 which bears the date of November 30, 1988.

On June 9, 1989, the Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request (CMS No. 94958) which stated as follows:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on October 12, 1988, but the request was not mailed until March 24, 1989, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied."

YSC thereupon timely filed a petition with the Division of Tax Appeals seeking administrative review of the conciliation order.

SUMMARY OF PETITIONER'S POSITION

Petitioner's representative, Brian B. Song, C.P.A., maintains that, on November 30, 1988, he personally prepared a request for a conciliation conference, a petition for revision of determination of the sales tax assessment and a corporate power of attorney appointing him as YSC's representative, and that he personally placed these documents in an envelope addressed to the Bureau of Conciliation and Mediation Services, New York State Tax Department, Building 9, W. A. Harriman Campus, Albany, New York 12227. After sealing the envelope and affixing the proper postage, Mr. Song contends that he personally brought the envelope to the U.S. Post Office located adjacent to his office at 38 West 32nd Street in New York City where the envelope was placed in a mail receptacle located within the Post Office.

Mr. Song alleges that, on February 27, 1989, he attended the conciliation conference of La Reine Fashion, Inc., the buyer in a bulk sale transaction with YSC, as seller, and, at the conference, was informed that YSC's request for a conciliation conference had never been received. He, therefore, mailed another such request on March 24, 1989 (see Finding of Fact "3").

CONCLUSIONS OF LAW

A. A petition for a hearing before the Division of Tax Appeals must be filed within 90 days from the date of issuance of a notice of determination (Tax Law § 1138[a][1]). This time period is suspended, however, if the taxpayer opts instead to file a request for a conciliation conference (Tax Law § 170[3-a][b]). The request for a conciliation conference must itself be filed within 90 days from the date of issuance of the notice of determination and there can be no extension of this time limitation (20 NYCRR 4000.3[c]).

B. Petitioner's representative maintains that he timely mailed, by ordinary mail, a request for a conciliation conference which the Division of Taxation denies having ever received. His subsequent request, mailed on March 24, 1989, is clearly beyond the requisite 90-day time

period. Therefore, unless it can be proved that petitioner's initial request was timely filed, the notices of determination at issue herein would finally and irrevocably fix the tax (Tax Law § 1138[a][1]) and the Division of Tax Appeals would be without jurisdiction to address the substantive issues relative thereto.

In Matter of Sipam Corporation (Tax Appeals Tribunal, March 10, 1988), the Tax Appeals Tribunal was asked by petitioner to accept testimony from petitioner's accountant as proof that a petition, mailed by ordinary mail, had been filed within 90 days from the issuance of the notice of determination. The Tribunal, after examination of Tax Law § 1147(a)(2) relating to the mailing of sales tax documents and section 7502 of the Internal Revenue Code upon which this section of the Tax Law is patterned, rejected petitioner's position and held that, as a matter of law, proof of ordinary mail was insufficient to prove a timely filing when there had been no actual delivery of the petition. In Matter of WSD United Transportation, Inc. (Tax Appeals Tribunal, July 27, 1989), the Tribunal similarly rejected an affidavit from the taxpayer's accountant as proof of the mailing of a petition by ordinary mail within 90 days from the date of issuance of the notice of determination.

C. As indicated in Finding of Fact "2", supra, the Division of Taxation has produced sufficient evidence to prove that the notices of determination were issued to YSC on October 12, 1988 and that such issuance complied with the requirements therefor as set forth in Tax Law § 1147(a)(1). Since YSC's request for a conciliation conference was not received by the Division within the requisite 90-day period and since the testimony and affidavit of YSC's representative is, as a matter of law, insufficient to prove timely filing (see Conclusion of Law "B"), it is hereby determined that the Division of Taxation properly denied YSC's request for a conciliation conference on the basis that the filing of such request was untimely.

D. The petition of YSC Fashion Corporation is dismissed.

DATED: Troy, New York

5/2/91
